IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 524 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAIYED SALIM SAIYED HUSSAIN SAIYED - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MHM SHAIKH for Appellant(s) : 1,
MR KT DAVE ADDL PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 18/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellant ('the accused' for short) was tried by the learned Additional City Sessions Judge, Court No.13, City Sessions Court, Ahmedabad in Sessions Case No. 255 of 1999 for commission of the offences punishable under Section 8 (c) read with Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), arraigned on the charge of having found with contraband article 'charas' weighing 257 grams, without pass or permit, when he was intercepted and apprehended near Lal Mills Cross Roads, adjacent to SRP Point, Gomtipur, on the basis of the prior information received by P.W.1, Ravindrakumar Kashiram Bhatt, Senior Police Inspector. At the end of the trial, the accused was found guilty of the offences with which he was charged and as his complicity is proved, the learned Judge of the trial Court convicted him vide judgment and order dated 5.5.2000 for commission of the offences

punishable under sections 8 (c) read with Sections 21 and 29 of the NDPS Act and sentenced him to suffer R.I. for ten years and fine of Rs.1 lakh i.d., R.I. for further period of one year. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused has filed this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short).

2. Briefly stated, the prosecution case as disclosed from the FIR and unfolded during trial, is as under:

2.1. P.W.1, R.K. Bhatt, Senior P.I. Gomtipur Police Station, received a secret information from informant to the effect that a person, put on black trouser and black shirt with white stripes, would be coming from Kalandari Masjid, going through the Lal Mills Cross Roads and going towards Usha Talkies on a Scooter bearing Registration No. GRM 4286 with narcotic substance in the dickey of the scooter.

2.2. On receipt of the said information, P.W.1, R.K. Bhatt, went to Gomtipur Police Station and recorded the said secret information in the station diary and also sent copies thereof to his official superiors i.e., ACP “H” Division and DCP, Zone V. Thereafter he requisitioned service of two persons to act as panchas. After procuring presence of two panchas, he conveyed the said secret information to the two panchas and also to the members of the raiding party. Accordingly, he prepared the preliminary panchnama to the said effect.

2.3. After preparing the preliminary panchnama, he along with the panchas and the members of the raiding party went to Lal Mills Cross Road and kept vigil on the road. It is also the case of the prosecution that at about 19.00 hours, a person corresponding to the description given in the secret information, came on the scooter No. GRM 4286. P.W.1, R.K. Bhatt, intercepted and apprehended him and informed him that, as per the secret information received by

him, he had information about narcotic substance being carried by a person corresponding to the description of the accused. On inquiring his name, the accused informed that his name is Saiyed Salim Saiyed Hussain. The accused was given a written memo in compliance of the provisions of Section 50 of the NDPS Act. P.W.1, R.K. Bhatt also informed the accused that as per the secret information he wants to search him and if the accused prefers that he should be searched in presence of a gazetted officer or a magistrate, he would make arrangement for the same but the accused did not opt for that and informed P.W.1, R.K. Bhatt that he may be searched by him. Thereupon, P.W.1, R.K. Bhatt searched the person of the accused and on opening the dickey of the scooter, a plastic bag was found and therein he found two semi circular lumpy substance. P.W.1, R.K. Bhatt, thereafter called G.D. Sharma, an Officer of FSL, who, on preliminary examination, opined that the substance recovered was 'charas'. Thereafter, Sakal Rajaram, a gold-smith, was called for

weighing the contraband article and on weighing it, it was found that the contraband article recovered from the accused was 257 grams with the plastic bag and without the plastic bag it was weighing 252 grams. Thereafter G.D. Sharma, Officer of the FSL, took 50 grams of charas as sample from both the pieces and put it in a cover. Thereafter the plastic bags were heat sealed and wrapped in paper and tied with string. The sample was given Mark A-1 and and the muddamal narcotic substance was marked as mark A. It is also the case of the prosecution that search memo and arrest memo were prepared on the spot and served to the accused. Thereafter on the basis of the complaint given by P.W.1, R.K. Bhatt, PSO of Gomtipur Police Station registered the offences against the accused and report under section 157 of the Code was made by P.W.1. Thereafter further investigation was handed over to P.W.8, S.R. Yadav, Police Sub Inspector, by the PSO.

2.4. After taking over the investigation,

P.W.8, S.R. Yadav, recorded the statements of the members of the raiding party and panch witnesses and concerned PSO of Gomtipur Police Station, muddamal mark A-1 was forwarded to FSL, Ahmedabad for analysis and thereafter on receipt of the report from FSL certifying that the said muddamal was 'charas' and as sufficient incriminating evidence was found against the accused, he was charge sheeted for commission of the offences punishable under section 8 (c) read with sections 21 and 29 of the NDPS Act in the City Sessions Court, Ahmedabad.

2.5. The learned Additional City Sessions Judge, Court No.13, Ahmedabad to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under section 8 (c), read with Sections 21 and 29 of NDPS Act which was read over and explained to the accused. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried in Sessions Case No. 255 of 1999.

2.6. To prove the culpability of the accused, the prosecution has examined and relied upon the oral testimony of 8 witnesses, the details of which are given in para 5 of the impugned judgment and order. They are as under:

P.W. No	Name and status of witness	Ex.No.	Page No
1	Ravindrakumar Kashiram Bhatt, the complainant	10	39-60
2	Jayantkumar Ganpatrao Marathi-Panch witness	23	61-70
3	Gnaneshwar Ramdas Gajjar – Panch witness	24	71-78
4	Mahendrasinh Balusinh	25	79-90
5	Dipsinh Virsinh	26	91-96
6	Somaji Rajaniji	28	97-100
7	Ganpatsinh Balusinh	29	101-106
8	Shivnathsing Rajdevsing Yadav, I.O.	30	107-114

2.7. To prove the case against the accused, the prosecution also produced and relied upon a number of documents, the details of which are mentioned in paragraph 6 of the impugned judgment and order.

2.8. After recording of the evidence of the prosecution witnesses was over, the learned Judge of the trial Court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution in toto. He, however, did not lead any evidence nor did he examine any witness in support of his defence. However, he filed a separate written statement which is on record at page 149, wherein, inter alia, it has been stated by him that the muddamal charas was not recovered from him. Though it was alleged against him that he was intercepted on 9.9.1999 while riding his scooter, in fact he was not riding the scooter nor he is the owner of the said scooter. He has also stated that just with a view to save the original owner, P.W.1, R.K. Bhatt, has wrongly entrapped him after calling him from his residence on 9.9.1999 at about 6 O' clock in the

evening. P.W.1, R.K. Bhatt has also recovered Rs.3,000/- which was the salary given by his employer as well as Rs.210/- from him. The police has also recovered his driving licence after calling for it from his residence. It is also stated by him that he has never smoked nor has he seen the contraband article charas prior to the alleged incidence. He is having his wife, children and parents to look after. In past no criminal complaint was lodged against him. The sum and substance of the further statement filed by the accused is that he is innocent and has been wrongly entrapped by P.W.1, R.K. Bhatt in a false case.

2.9. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the learned Judge of the trial court held that the prosecution has established, beyond reasonable doubt, that on 9.9.1999 near Lal Mills Cross Road, near SRP Point, Gomtipur the accused was found in possession of the contraband article charas weighing 257 grams. Therefore, the

complicity of the accused is established by the prosecution beyond reasonable doubt. He, therefore, held the accused guilty for commission of the said offences with which he was charged and convicted him for commission of the offences under Section 8 (c) read with sections 21 and 29 of the NDPS Act and sentenced him to suffer R.I. for ten years and fine of Rs.1 lakh and i.d., R.I. for further period of one year, which has given rise to instant appeal at the instance of the accused.

3. Mr. MHM Shaikh, learned advocate for the accused, has contended that the prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained under the NDPS Act and, therefore, on account of non-compliance of the provisions of NDPS Act, the prosecution evidence cannot be relied upon and cannot be acted upon. P.W. 2, Jayantkumar Ganpatrao Marathi, Ex.23 and P.W.3, Gnaneshwar Ramdas Gajjar, Ex.24 are panch witnesses and they are independent witnesses,

but they have not supported the case of the prosecution case, and, therefore, the prosecution has failed to establish the charge levelled against the accused. It is also contended by him that the learned Judge of the trial court has misdirected himself in relying upon the oral testimony of P.W.1, R.K. Bhatt and P.W.4, Mahendrasinh Balusinh in respect of the alleged secret information, search of the person of the accused and the scooter, seizure of muddamal and the arrest of the accused at the scene of the offence. He also tried to demonstrate by reading the evidence of those two witnesses as to why their evidence cannot be relied upon. It is also emphasized by him that non-examination of G.D. Sharma, an officer of the FSL who was allegedly called upon at the scene of offense for preliminary examination of the muddamal and Sakal Rajaram, who allegedly measured the weight of the muddamal at the scene of offence, creates serious doubt about the veracity and trustworthiness of evidence of P.W.1, RK Bhatt and P.W.4, Mahendrasinh Balusinh

in respect of the alleged search and seizure of the muddamal at the scene of the offence. Mr. Shaikh further contended that the learned Judge of the trial court ought to have drawn adverse inference in favour of the accused and should not have relied upon the oral testimony of aforesaid two witnesses to secure conviction. It is also pointed out by him that the prosecution has failed to establish the fact that the muddamal contraband article reached the FSL intact and there was possibility of tampering with the muddamal on its journey from the time of seizure and filing of the complaint till it reached to the FSL. According to Mr. Shaikh, there is non-compliance of the provisions of section 52 and 55 of the NDPS Act. It is also criticized by him that the learned Judge of the trial court has erred in not appreciating the submissions made by the defence that the scooter bearing Registration No. GRM 4286 was not belonging to the accused. The owner of the said scooter was not examined to prove that the scooter was entrusted to the accused on the day of the incident. Moreover, the

investigating officer has not recovered any document with regard to the ownership of the scooter nor did he recover any document showing that the accused was in possession of the scooter. It is also contended by him that the accused has filed further written statement while recording his further statement under Section 313 of the Code wherein he has specifically raised defence about the fact that he was not the owner of the scooter. However, the learned Judge of the trial court has not appreciated the said defence in its true perspective. The learned Judge of the trial court has erred in holding that the muddamal charas weighing 257 grams was properly and legally handled and it was not tampered with till it reached at FSL Ahmedabad in sealed intact condition. By reading evidence in this regard Mr. Shaikh tried to convince this court that the muddamal was tampered with on the way from the police station to FSL Ahmedabad.

3.1. On the aforesaid premises, it is submitted by him that the prosecution has failed

to establish the charge levelled against the accused beyond reasonable doubt and therefore, the impugned judgment and order of conviction and sentence deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offences with which he was charged. He, therefore, urged to allow the appeal.

4. In counter submission, Mr. KT Dave, learned APP has submitted that by voluminous evidence produced by the prosecution, the complicity of the accused is proved beyond reasonable doubt. The accused was found and caught red-handed with contraband article charas weighing 257 grams when he was intercepted by P.W.1, RK Bhatt, while he was riding the scooter No.GRM 4286 near Lal Mills Cross Road. He has also submitted that after following and observing the mandatory and statutory provisions contained under the NDPS Act, the contraband article was seized and sealed in presence of the members of the raiding party as well as panchas. It is also

submitted by him that the report of FSL in terms certified that the contraband article which was sent for analysis was charas. It is asserted by him that the prosecution has successfully established that the sample sent to FSL Ahmedabad was not tampered with during the course of its journey from the stage of seizure and filing of the complaint till reaching at FSL. It is also pointed out by him that panchas turning hostile is not unknown to criminal jurisprudence and that now-a-days it is on increase but that fact itself does not weaken the case of the prosecution as the case does not depend solely on the evidence of the panch witnesses. According to him, if the evidence of the members of the raiding party is of sterling quality then there is no reason to discard their evidence and on the basis of the evidence of the members of the raiding party, order of conviction can be passed.

4.1. On the aforesaid premises, according to Mr. Dave, learned APP, the prosecution has

established the case against the accused beyond reasonable doubt and, therefore, the learned Judge of the trial court has rightly recorded the order of conviction and sentence. He further submitted that the impugned judgment and order does not call for any interference of this court in this appeal and as the appeal lacks merit, it deserves to be dismissed. He, therefore, urged to dismiss the appeal.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a compete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the learned Judge of the trial

Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned Judge of the trial Court has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

7. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as

under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith”.

8. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Sub Inspector during the course of search of the accused and seizure of the muddamal, contraband article, charas.

9. In this connection, we shall first refer to the testimony of P.W.1, R.K. Bhatt, Ex.10, at pages 39-60 of the paper book. He has, inter alia, testified that he was serving as Senior P.I. Gomtipur Police Station, at the relevant time. On 9.9.1999, received a secret information from informant to the effect that a person, put on black trouser and black shirt with white stripes, would be coming from Kalandari Masjid, going through the Lal Mills Cross Roads and going

towards Usha Talkies on a Scooter bearing Registration No. GRM 4286 with narcotic substance in the dickey of the scooter. On receipt of the said information, he went to Gomtipur Police Station and recorded the said secret information in the station diary and he also sent copies thereof to his official superiors i.e., ACP “H” Division and DCP, Zone V. Thereafter he requisitioned service of two persons to act as panchas. After procuring presence of two panchas, he conveyed the said secret information to the two panchas and also to the members of the raiding party. Accordingly, he prepared the preliminary panchnama to the said effect.

9.1. After preparing the preliminary panchnama, he along with the panchas and the members of the raiding party went to Lal Mills Cross Road and kept vigil on the road. At about 19.00 hours, a person corresponding to the description given in the secret information, came on the scooter No. GRM 4286. He intercepted and apprehended the rider of the scooter and informed

him that, as per the secret information received by him, he had information about narcotic substance being carried by a person corresponding to the description of the accused. On inquiring his name, the accused informed that his name is Saiyed Salim Saiyed Hussain. The accused was given a written memo regarding compliance of the provisions of Section 50 of the NDPS Act. He also informed the accused that as per the secret information he wants to search him and if the accused prefers that he should be searched in presence of a gazetted officer or a magistrate, he would make arrangement for the same but the accused did not opt for that and informed him that he may be searched by him. Thereupon, he searched the person of the accused and on opening the dickey of the scooter, a plastic bag was found therein which was containing two semi circular lumpy substance. He thereafter called G.D. Sharma, an Officer of FSL, who on preliminary examination opined that the substance recovered was charas. Thereafter, Sakal Rajaram, a gold-smith was called for weighing the

contraband article and on weighing it, it was found that the contraband article recovered from the accused was 257 grams with the plastic bag and without the plastic bag it was weighing 252 grams. Thereafter G.D. Sharma, the Officer of the FSL took 50 grams of charas as sample from both the pieces and put the same in a cover. Thereafter the plastic bags were heat sealed and wrapped in paper and tied with string. The sample was given Mark A-1 and and the muddamal narcotic substance was marked as mark-A. He thereafter prepared search memo and arrest memo on the spot and served to the accused. Thereafter on the basis of the complaint given by him, PSO of Gomtipur Police Station registered the offences against the accused and he also made a report under section 157 of the Code.

9.2. In short, he has deposed as per the complaint lodged by him with Gomtipur Police station, which is on record at Ex.15, at pages 273-282 of the paper book. A perusal of the complaint at Ex.15, it is seen that oral

testimony of the complainant gets corroboration from the complaint and there is no contradiction between the complaint and the oral testimony of P.W.1, RK Bhatt. It is also mentioned in the complaint about the strict compliance of the provisions of Sections 42, 43, 50, 52 and 57 of the NDPS Act. It may be noted that P.W.1, RK Bhatt, was cross-examined by the learned advocate of the accused but he has successfully withstood the test of cross-examination and nothing substantial has been brought out during his cross-examination which would impeach his credibility.

10. The prosecution has thereafter examined P.W.2, Jayantkumar Ganpatrao Marathi, Ex.23, at pages 61-70 of the paper book and P.W.3, Gnaneshwar Ramdas Gujjar, Ex.24, at pages 71-78 of the paper book. Both of them are panch witnesses whose service was requisitioned by P.W.1, R.K. Bhatt, for carrying out the raid and in their presence preliminary panchnama as well as final panchnama were drawn, the accused was

intercepted, he was searched, contraband article was seized and sealed. However, they have not supported the prosecution case and turned hostile and, therefore, they were cross-examined by the learned APP. During their cross-examination they stuck to the same version and denied their attending Gomtipur Police Station as well as accompanying the P.W.1, R.K. Bhatt and the members of the raiding party at the time of raid. It may be noted that so far as the evidence of P.W.1, R.K. Bhatt and other witnesses who were members of the raiding party is concerned, they are consistent before the court in testifying that Rameshbhai, a head constable was sent for calling two panchas and they are also consistent before the court in their oral testimony that both the panchas were present during the entire raid, from the time of preparing preliminary panchnama till the final panchnama was drawn, and, therefore, vide order dated 2.3.2000 the learned judge of the trial court has exhibited the said panchnama which was given mark A, as Ex.32. Therefore, there is no reason to discard

the oral testimony of P.W.1, RK Bhatt and other witnesses with regard to the contents of the Panchnama and the said contents of the panchnama can be read in evidence. A perusal of the contents of the panchnama clearly establishes that all the formalities were completed by P.W.1, RK Bhatt and the members of the raiding party and in the said panchnama it has been mentioned as to how the accused was intercepted, searched and how the contraband article was recovered and sealed in presence of both panchas. In view of the above, according to this Court, the contention of Mr. Shaikh, learned advocate for the accused, that P.W.2 and P.W.3, who are panch witnesses and said to be independent witnesses, have not supported the prosecution case and hence the prosecution has failed to prove the panchnama and, therefore, the prosecution case cannot be believed, has no substance is found absolutely meritless.

11. It is well settled by catena of decisions

of the Supreme Court that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized hat the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision to the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panch as so far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by the court on the ground that they are police officers. On the facts and in the circumstances of the case, this Court finds that

the testimonies of P.W.1 and P.W. 4 to 8 which shall be discussed hereafter not only inspire confidence but get corroboration from the other evidence on record and from the evidence P.W.1,R.K. Bhatt and other witnesses, the contents of the panchnama, which is on record at Ex.32, are proved.

12. The prosecution has thereafter examined P.W.4, Mahendrasinh Balusinh, Ex.25, at pages 79-90 of the paper book. He inter alia testified that on 9.9.1999 he was on duty as rifleman at Gomtipur Police station. He has testified that the raid was carried out by P.W.1, R.K. Bhatt, in his presence and other witnesses, who were members of the raiding party and the panchas. He has further testified that when the accused was intercepted and contraband article was recovered from him and when it was sealed, he and other police personnel and panchas were present. He has also testified that Rameshbhai, Head Constable was sent to call two panchas.

13. The prosecution has thereafter examined P.W.5, Dipsinh Virsinh, Ex.26, pages 91-96 of the paper book. He has testified that he was serving at Gomtipur Police station as Crime Writer Head. He has further testified that P.W.1, RK Bhatt, entrusted the muddamal in a sealed packet to him which he took in his custody. Along with muddamal two other packets consisting of driving licence and cash of Rs.3210/- and the scooter was also entrusted to him. He has made arrangement to send the muddamal to FSL Ahmedabad through P.W.4, Mahendrasinh Balusinh.

14. The prosecution has thereafter examined P.W.6, Somaji Rajaniji, Ex.28, at pages 97-100 of the paper book. He was in charge officer of Gomtipur Police station since 11.8.1999. He has given the charge of station diary to P.W.1, R.K. Bhatt. P.W.1, R.K. Bhatt made entry Nos. 13 and 14 in the station diary. The said entries were with regard to the secret information received by

him, with regard to narcotic substance.

15. The prosecution has thereafter examined P.W.7, Ganpatsinh Balusinh, ex.29, at pages 101-106 of the paper book. He was PSI of Gomtipur police station at the relevant time. He registered the complaint as narrated by P.W.1, R.K. Bhatt. He has also testified that P.W.1, R.K. Bhatt entrusted the accused and muddamal charas weighing 257 grams, the scooter, cash of Rs.3210/- and driving licence of the accused which in turn handed over to P.W.6, Somaji Rajaniji.

16. The prosecution has thereafter examined P.W.8, Shivnathsing Rajdevsing Yadav, Ex.30, at pages 107-114 of the paper book. He has investigated the complaint filed by P.W.1, R.K. Bhatt. He has testified that he has perused the complaint, panchnama and the entry with regard to secret information made in the station diary and the report conveying the said information to

higher official. He has further testified that the statements of the witnesses were recorded by him and he also arranged to send the muddamal through P.W.4, Mahendrasinh Balusinh, police constable to FSL, Ahmedabad and after receipt of the report from FSL, he filed the charge sheet.

17. It may be noted that all the above mentioned witnesses i.e.., P.W. 4 to P.W.8 successfully withstood the test of cross-examination. Nothing substantial has been brought out from their evidence which would impeach their credibility. They have in unequivocal terms testified before the court as to what role they played in the raid. They have also testified about the compliance of statutory and mandatory provisions of Sections 42, 43, 50, 52 and 57 of the NDPS Act.

18. So far as the statutory provisions contained under Section 42 (1) of the NDPS Act is

concerned, it deals with power of entry, search, seizure and arrest without warrant or authorization in a building, conveyance or enclosed place, between sunrise and sunset. So far as Section 42 (2) of the NDPS Act is concerned, it provides that where an officer takes down any information in writing under sub-section (1) of section 42 of the NDPS Act or records grounds for his belief under the provisos thereto, he shall forthwith send a copy thereof to his immediate official superior.

19. Admittedly, the secret information received by P.W.1, R.K. Bhatt was reduced into writing and he conveyed the said secret information to his immediate official superior.

20. Section 43 of the NDPS Act provides for Power of seizure and arrest in public places. The accused was intercepted and caught hold of at Lal Mills Cross Road which is a public place and, therefore, in the instant case, admittedly Section 43 of the NDPS Act has to be invoked and

not section 42 of the NDPS Act.

21. In the case of State of Punjab v. Balbirsingh, AIR 1994 SC 1872, the Supreme Court has observed that Section 43 which deals with the power of seizure and arrest in public places is slightly different from section 42 of the NDPS Act in certain respects. The empowered officer while acting under section 43, need not record any reasons of his belief. Section 43 also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to section 42. A similar view is expressed by this court in the case of State of Gujarat v. Abdul Rasid Ibrahim Mansuri, 1991 Drugs Cases 1 (Gujarat). In the said case the prosecution case was that the accused was found at public premises. At the same time, it was not the defence of the accused that he was at some place other than public premises. So legal position is clear that section 43 of the NDPS Act would be applicable to the facts of that case.

22. In view of the aforesaid clear elucidation of the Supreme Court and this Court as well as testimonies, in instant case, provisions of Section 43 would be applied as the raid was carried out at a public place. Notwithstanding the aforementioned legal position, the secret information received by P.W.1, R.K. Bhatt was reduced into writing and it was immediately communicated to his official superior as can be reflected from the documentary evidence on record. Therefore, the compliance of the mandatory provisions of section 42 of the NDPS act though not required, they have been fully complied with.

23. So far as the compliance of the mandatory provisions of Section 50 of the NDPS Act is concerned, the evidence is consistent. At the time of interception and raid, P.W.1, R.K. Bhatt, had informed the accused that if he so desired, he could be searched in presence of a gazetted

officer or a magistrate or if he desired that he may be searched by him, then he will search him and the option was left to the accused and the accused preferred the second option and volunteered to be searched by P.W.1, R.K. Bhatt. Therefore, P.W.1, R.K. Bhatt, in presence of the panchas and Officer of the FSL and other police personnel who were members of the raiding party, searched the person of the accused and during the search he found contraband article from the dickey of the scooter. During the search of his person, from the pocket of the accused, an amount of Rs.3210/- was recovered. Similar is the evidence of other witnesses who were the members of the raiding party. Therefore, provisions of Section 50 of the NDPS Act have been complied with. The said aspect has been reflected in complaint Ex.15, at pages 273-282 as well as panchnama at Ex.32, pages 315 to 324 of the paper book. Besides this, all the witnesses who were members of the raiding party have deposed accordingly. Therefore, it is clear that mandatory provisions of Section 50 of the NDPS

Act have been fully complied with.

24. So far as the journey of the muddamal from the stage of interception of the accused, search of the person of the accused and scooter and seizure and sealing of charas till it reached FSL Ahmedabad has also been duly proved and all the witnesses, in this regard, is consistent. As per the said evidence, the muddamal was not tampered with at any stage and it reached FSL Ahmedabad intact in sealed condition. The procedure for sealing was done as per the practice adopted by the police in NDPS cases. FSL report Ex.31, at pages 305-314, clearly shows that the packet was sealed having one white paper wrapped by thread and the contraband article was packed in a plastic bag and the weight of it was 50.1819 grams. It is also clear from the FSL report that it was received by FSL intact in sealed condition and on analysis the muddamal it was found to be charas. Therefore, during journey of the muddamal from seizure and sealing till it reached FSL Ahmedabad for

analysis there was no question of tampering with the said muddamal.

25. Independently this court has also perused the documents which are mentioned in paragraph 6 of the impugned judgment and from the perusal of the same it is clear that P.W.1, R.K. Bhatt has strictly followed the mandatory and statutory provisions contained under the NDPS Act and no discrepancy could be noticed by this court on the part of P.W.1, R.K. Bhatt with regard to compliance of the provisions of NDPS Act.

26. On overall view of the matter, according to this Court, the mandatory and statutory provisions contained under sections 42 (1), 42 (2), 43, 50, 52 and 57 of the NDPS Act have been adhered to and complied with by P.W.1, R.K. Bhatt, and it is duly proved by the evidence of the prosecution witnesses. P.W.1, R.K. Bhatt, had taken utmost care and caution while seizing and sealing the said contraband article. The apprehension of tampering with the muddamal can

be ruled out as from the stage of recovery of the muddamal till its reaching the FSL, proper care and caution was taken by the police personnel. It is on the contrary clearly proved that it was in the safe hands of police personnel and it reached at FSL intact in sealed condition for chemical analysis.

27. The contention of Mr. Shaikh, learned advocate of the accused, that the accused is not the owner of the scooter and the investigating officer has not investigated with regard to the ownership of the scooter and therefore the prosecution case is not free from doubt, and that the accused was not riding the scooter at the relevant time as alleged against him in the charge-sheet and that no contraband article was recovered from him, has no substance and merit. It is seen that the accused has taken this defence in his further statement recorded under Section 313 of the Code and also by way of the suggestions made to the witnesses during the course of cross-examination by the learned

advocate for the accused to the effect that accused was not the owner of the scooter bearing registration No.GRM 4268 and that the police, with malafide intentions, have tried to protect the real owner of the said scooter and has falsely implicated the accused. There is nothing on record as would even remotely suggest that it was not the accused himself who was riding the scooter in question. The accused claimed that he was not posed questions or granted an opportunity provided for in Sections 42 and 50 of NDPS Act and when the accused comes out with the theory that his scooter was searched within seconds of the same being stopped, it pre-suggests that it was the accused himself who was riding the scooter and the accused cannot be allowed to approbate and reprobate in this count. Therefore it has to be deduced that the accused himself was riding the said scooter and he was in conscious and physical possession of the contraband article charas and the prosecution has clearly established this fact. It is also required to be noted that under the provisions of Section 54 of

the NDPS Act, the accused has to rebut the presumption and prove that the contraband article charas was not found from his conscious possession. Since the prosecution has been able to establish the guilt of the accused by voluminous evidence in the form of oral as well as documentary evidence and when the accused has not been able rebut the presumption against him that he was riding the scooter at the relevant time and contraband article charas was recovered from the dickey of his scooter, this Court finds no merit and substance in the above contention of Mr. Shaikh, learned advocate for the accused and, therefore, the said contention is rejected.

28. In view of the aforesaid evidence, there is no manner of doubt that when the accused was intercepted, apprehended and searched, he was found in possession of contraband article charas. Necessary formalities of search and seizure were complied with in presence of panchas and the statutory requirements and formalities contained under the NDPS Act were followed and the sample

was sent to FSL Ahmedabad for analysis after following the procedures under the NDPS Act.

29. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial court, as according to us, no other conclusion is possible except the one reached by the trial court in the facts and circumstances of the case.

30. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the trial court is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

31. In aforesaid view of the matter, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. The sentence awarded to the accused is minimum and has to be maintained.

32. At this stage, it has been pointed out by Mr. K.T. Dave, learned PP, that the contraband article was charas and possessing the said contraband article, without pass or permit, is punishable under section 20 (b) (ii) of NDPS Act. However, through inadvertent mistake, the learned judge of the trial court has framed charge against the accused for commission of the offence punishable under Section 8 (c) read with Sections 21 and 29 of the NDPS Act and also convicted the accused for the said offences. It is an error in framing the charge. However, the said error in framing charge cannot be said to be failure of justice in view of the provisions of Section 464 of the Code. Therefore, the

conviction recorded against the accused for commission of the offences punishable under Section 8 (c) read with Sessions 21 and 29 of the NDPS Act may be altered into the conviction for commission of the offence punishable under Section 20 (b) (ii) of the NDPS Act.

33. It is true that the learned judge of the trial Court has, through inadvertent mistake, framed charge against the accused for commission of offence punishable under section 8 (c) read with sections 21 and 29 of the NDPS Act, which is a mistake apparent on the face of the record as possessing the contraband article 'charas' without pass or permit, is punishable under section 20 (b) (ii) of the NDPS Act. Section 464 of the Code in terms stipulates that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges,

unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. In instant case, according to this court, the error committed by the learned Judge of the trial Court in framing the charge has not resulted into failure of justice and no prejudice has been caused to the accused. Therefore, this court, being a Court of appeal, can modify/alter the order of conviction by convicting the accused for commission of offence punishable under section 20 (b) (ii) of the NDPS Act instead of section 8 (c) read with Sections 21 and 29 of the NDPS Act. The fact that in instant case there is only one accused and, therefore, there is no question of invoking section 29 of the NDPS Act. In spite of that the learned Judge of the trial Court has framed charge against the accused for commission of offence under section 29 of the NDPS Act also. This shows that the learned Judge of the trial Court has committed an inadvertent mistake, which we correct in this judgment.

34. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial court and as the appeal lacks merit, it deserves to be dismissed. Of course, the conviction is required to be altered by convicting the accused under Section 20 (b) (ii) of the NDPS Act instead of section 8 (c) read with sections 21 and 29 of the NDPS Act.

35. For the foregoing reasons, the appeal fails and accordingly it is dismissed. The conviction of the accused is altered from section 8 (c) read with sections 21 and 29 of the NDPS Act to conviction under Section 20 (b) (ii) of the NDPS Act. So far as the sentence is concerned, the learned judge of the trial court has imposed the minimum sentence prescribed for commission of the offence under section 20 (b) (ii) of the NDPS Act and, therefore, the same is confirmed and maintained.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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